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Attorneys for STATE OF ARIZONA

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2011 NOV 28 PM 4:12 ✓

SANDRA K. HARRIS, CLERK

BY: 

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

V1300CR201080049

Plaintiff,

STATE'S RESPONSE TO DEFENDANT'S
REVISED STATEMENT OF COSTS
REGARDING MOTION
TO COMPEL ALL
INFORMATION/REQUEST FOR
SANCTIONS

vs.

JAMES ARTHUR RAY,

Defendant.

(The Honorable Warren Darrow)

The State of Arizona, through undersigned counsel, objects to Defendant's Revised Statement of Costs Regarding Motion to Compel Disclosure of All Information. The Defendant's Motion seeks costs clearly outside the scope of the Court's March 8, 2011 Minute Entry and seeks costs that are excessive. The State's position is more fully set forth in the Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction:

This Court has clearly stated that the Defendant is entitled to costs only as they relate to the discovery dispute over what information was presented to the medical examiners at the December 2009 meeting and who provided that information. *See Minute Entry dated March 8, 2011.* In that Minute Entry, this Court also clarified that the Defendant's recoverable costs

1 “should relate *primarily to the time actually needed for supplemental telephonic interviews* in
2 this limited area.” *Id.* (Emphasis added.) The Court also noted that no sanctions are appropriate
3 regarding “[t]he dispute over providing attorney or other notes relating to the meeting” as it
4 involved a *good faith disagreement* in an unsettled area of law. *Id.* (Emphasis added.)

5 In his Revised Statement of Costs Regarding Motion to Compel Disclosure of All
6 Information, the Defendant seeks costs that are outside the scope of the Court’s Minute Entry of
7 March 8, 2011. Specifically, (1) the Defendant has failed to identify what portion of his costs
8 relate to the discovery dispute concerning information presented to the medical examiners at the
9 December 2009 meeting and who provided that information; (2) he seeks costs that are clearly
10 outside the scope of the discovery dispute; and (3) he seeks costs that are excessive because
11 Defendant refused to conduct telephonic supplemental interviews. For these reasons, this Court
12 should deny Defendant’s Revised Statement of Costs.
13

14 **The Facts:**

15 On June 29, 2010, Defendant filed a Motion to Compel Disclosure of all Information and
16 Materials Regarding the Medical Examiners’ Opinions on Cause of Death and Request for
17 Sanctions. Defendant’s Motion was filed after the following had occurred:
18

- 19
- 20 • On May 21, 2010, Defendant conducted a defense interview of Medical Examiner Dr.
21 Art Mosley who answered all questions posed by Defendant without objection by the
22 State. Defendant learned at that time of the December 2009 charging meeting at the
23 County Attorney’s Office and the presentation of a PowerPoint to all present. At that
24 time, Detective Diskin also answered all questions posed by the defense without
25 objection by the State.
 - 26 • On May 24, 2010, Defendant sent a letter to the State demanding disclosure of (1) the
names of all persons who attended the meeting, (2) a copy of the Power Point, (3) any

1 audio recording of the meeting, (4) notes of the meeting, and (5) any *Brady* material that
2 arose in the meeting. The State responded in writing, citing the work product privilege.

- 3 • Defendant then interviewed Detectives Diskin, Poling and Lt. Boelts of the Yavapai
4 County Sheriff's Office on June 16, 2010, and medical examiners Dr. Mark Fischione
5 and Dr. Lyon on June 17, 2010. During these interviews, the State asserted its work
6 product privilege with respect to the December 2009 meeting.
- 7 • On June 29, 2010, Defendant filed his Motion to Compel asking this Court for an order
8 compelling the State to disclose and provide the following:

9 (1) the names of all persons who attended the December 14, 2009 meeting;

10 (2) a copy of the Power Point slideshow and any other material provided to
11 the medical examiners;

12 (3) any notes, including without limitations those of the prosecutors to the
13 extent that they contain *only* the statements of the medical examiners at the
14 meeting;

15 (4) re-interviews of Drs. Fischione and Lyon, Detective Diskin and
16 Sergeant Boelts without further obstruction from the State.

- 17 • On September 20, 2010, the Court granted the Motion to Compel. The State fully and
18 timely complied with the Court's Order.

19 Supplemental Interviews of the State's Witnesses

20 The State repeatedly urged defense counsel to telephonically conduct the supplemental
21 interviews ordered by this Court to minimize the costs. Counsel for Defendant refused. *See*
22 *Exhibit A – D, Correspondence between Sheila Polk and Truc Do, October 4, 2010.*

23 Court's Minute Entry Dated March 8, 2011

24 On January 21, 2011, the State filed a Motion for Reconsideration of Imposition of
25 Monetary Sanctions Against the State in Connection with Defendant's Motion to Compel. The
26 State also filed an Objection to Defendant's Request for Costs. On March 8, 2011, this Court
granted the State's Objection and denied the State's Motion for Reconsideration. In the minute
entry, this Court made clear the following:

- 1 • Defendant's request for costs was "excessive as it is not commensurate to the
- 2 disclosure violation found by this Court." *Minute Entry dated March 8, 2011.*
- 3 • The Court concluded "the State should not have limited the scope of the interviews
- 4 of the medical examiners." The Court determined that the material provided to the
- 5 medical examiners at the December meeting was not work product "once the State
- 6 provided material to the medical examiners to be considered in formulating
- 7 opinions on the cause of death." The Court further wrote the defense "was entitled
- 8 to discover what information was presented to the medical examiners at that
- 9 meeting and who provided that information." *Id.*
- 10 • With respect to costs, the Court wrote:
 - 11 ○ "Any monetary sanction should relate *only to this aspect of the discovery*
 - 12 *dispute* and should relate *primarily to the time actually needed* for
 - 13 supplemental *telephonic interviews* in this limited area." *Id.* (Emphasis
 - 14 added.)
 - 15 ○ "The dispute over providing attorney or other notes relating to the meeting
 - 16 involved a *good faith disagreement* in an unsettled area of law. *No*
 - 17 *sanctions are appropriate* as to that aspect of the motion to compel." *Id.*
 - 18 (Emphasis added.)
 - 19 ○ "Resolution of the disclosure issue *did not necessitate extensive briefing*
 - 20 *and oral argument*. In fact, the Court believes it may have been possible for
 - 21 the parties to resolve the issue by submitting it to the Court during or close
 - 22 to the time of conducting the interviews of the medical examiners." *Id.*
 - 23 (Emphasis added.)

22 **Argument:**

23 **A. Defendant's Revised Statement of Costs should be denied because his request far**
24 **exceeds the scope of this Court's Order.**

25 This Court's March 8, 2011 Minute Entry makes it clear that the Defendant can recoup
26 only those costs directly related to the discovery dispute over what information was presented to
the medical examiners at the December 2009 meeting and who provided that information. The

1 Court noted that the dispute over attorney and other notes was a good faith disagreement and no
2 sanctions are appropriate. The Court clearly stated that any monetary sanction "*should relate*
3 *primarily to the time actually needed for supplemental telephonic interviews in this limited*
4 *area.*" *Id.* (Emphasis added.)

5 Defendant submitted a Revised Statement of Costs that includes 63.4 hours of time of
6 three attorneys *solely* to research, write and argue the original Motion to Compel. The Defendant
7 claims \$350 per hour for each attorney for a total of \$22,190.00. This request for costs
8 contradicts the Court's order that recoverable costs should relate primarily to the time needed for
9 supplemental interviews." *Id.* The Court should deny this portion of the Defendant's request
10 because it is outside the scope of this Court's Order.

11
12 **B. Defendant's Revised Statement of Costs should be denied as excessive because**
13 **Defendant refused to conduct telephonic interviews to minimize expenses.**

14 The March 8, 2011 Minute Entry makes it clear that Defendant's recoverable costs
15 should be minimal and limited to telephonic supplemental interviews. As the Court wrote, any
16 monetary sanction "*should relate primarily to the time actually needed for supplemental*
17 *telephonic interviews in this limited area.*" *Id.* (Emphasis added.) Immediately following the
18 Court's granting of the Motion to Compel, the State contacted Defendant and requested that the
19 supplemental interviews be conducted telephonically. The Defense refused. The State re-urged
20 this approach in order to minimize costs; the Defense again refused. *See Exhibits A-D.*

21
22 The Defendant now claims costs that include federal express charges, hotel
23 accommodations for two at a rate of \$214.19 each, and ten hours of time for two attorneys to
24 personally conduct interviews, **for a total of \$4,134.43 for supplemental interviews that**
25 **should have been done telephonically.** This Court should deny this portion of the Defendant's
26 request because it is excessive.

1 **C. Defendant's Revised Statement of Costs should be denied because he seeks costs not**
2 **related to the discovery dispute.**

3 In the Revised Statement of Costs, the Defendant requests expenses to conduct
4 interviews of Lieutenant Boelts, Captain Rhodes and Detective Diskin. While Boelts and Diskin
5 were included in the scope of the Court's Order to Compel, Rhodes was not as the Defendant
6 had not previously interviewed him.¹ This Court should deny the Defendant's efforts to recover
7 costs associated with the interview of Rhodes.

8 **D. This Court should offset any costs against the State's costs of investigation.**

9 At the pre-sentence hearing, this Court admitted State's Exhibit 1163, a summary of the
10 State's costs of investigation and prosecution. At the conclusion of the pre-sentence hearing, the
11 State withdrew its request for reimbursement of costs in order to resolve all pending issues so
12 that judgment and sentencing could occur on November 18, 2011, without further delay.

13 Should this Court grant any costs to the Defendant in connection with the Motion to
14 Compel, this Court should offset such costs against the State's costs of investigation and
15 prosecution. Fairness requires this offset.
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¹ In his Motion to Compel, Defendant sought – and the Court ordered - re-interviews of
26 Drs. Fischione and Lyon, Detective Diskin and Sergeant Boelts. *See Defendant's Motion to Compel dated June 29, 2010.*

1 **Conclusion:**

2 For the reasons stated above, the State respectfully requests that this Court deny the
3 Defendant's Revised Statement of Costs. In the alternative, this Court should offset any costs
4 against the State's costs of investigation and prosecution.

5
6 RESPECTFULLY submitted this 28th day of November, 2011.

7
8
9 By 
10 SHEILA SULLIVAN POLK
11 YAVAPAI COUNTY ATTORNEY

12
13 **COPIES** of the foregoing emailed this 28th day
14 of November, 2011, to:

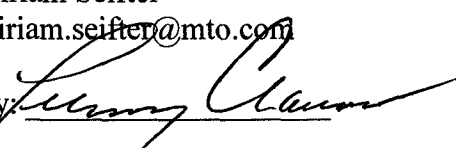
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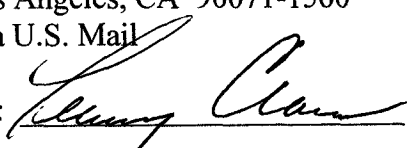
23 Miriam Seifter
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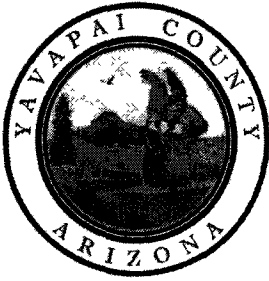
25 By: 

26 **COPIES** of the foregoing delivered this 28th
day of November, 2011, to:

Thomas Kelly
Via courthouse mailbox

Luis Li, Truc Do, Miriam Seifter
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LLP355 S. Grand Avenue, 35th Floor
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Via U.S. Mail

By: 



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SHEILA POLK
Yavapai County Attorney

October 4, 2010

VIA Email and US Mail

Truc T. Do
Munger, Tolles & Olson L.L.P.
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049: Your letter dated October 1, 2010 / Request to Limit Costs

Dear Ms. Do:

The December 14 PowerPoint

On September 22, 2010, the State provided you with a copy of the December 14 PowerPoint, in compliance with the Court's Order dated September 20, 2010. On September 24, you requested color copies of the PowerPoint, one to a page; approximately 60 pages, in color and one to a page, of the PowerPoint were made by September 30 and have been mailed to you.

Notes of the December 14 Meeting

In compliance with the Court's September 20 Order, the State has identified participants to the December 14 meeting and has requested of the participants whether they saved any notes taken, and if yes, to send the notes to the State. We are currently in the process of collecting any and all notes taken. As soon as that process is completed, we will redact the notes to ensure compliance with the Court's order and provide them to you.

Interviews of the Medical Examiners and the Detectives

The State is in receipt of your request to schedule interviews of the medical examiners and detectives. Please advise me whether you wish to proceed immediately or whether you want to wait until you have received disclosure of the notes as ordered by the Court.

Costs

In light of the Court's order giving both sides the opportunity to request a hearing concerning costs associated with the Defendant's Motion to Compel, the State asks that you take all reasonable and prudent steps to minimize costs associated with the re-interviews of the detectives and medical examiners. In that regard, the State proposes that the interviews be conducted via telephone or video-conferencing. We will make the necessary arrangements.

Please do not hesitate to contact me if you have any questions or need anything further.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Sheila S. Polk".

Sheila Sullivan Polk
Yavapai County Attorney

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October 4, 2010

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¹A PROFESSIONAL CORPORATION

VIA EMAIL

Sheila Polk
Yavapai County Attorney's Office
255 East Gurley Street
Prescott, Arizona 86301

Re: State v. James Arthur Ray

Dear Sheila:

Thank you for your letter today. I would like to resolve the following issues before this afternoon's status conference.

We would like to move forward with the re-interviews of the medical examiners and detectives as soon as possible. For that reason, I ask that you provide the notes of the December 14, 2009 meeting to us by this Friday, October 8, so that we may schedule the re-interviews. I believe this is sufficient time, given the Court's ruling of September 20th, for the State to gather and redact any work product from the notes.

Mr. Ray does not intend to incur any unreasonable or unnecessary costs with respect to discovery in this matter. However, given the importance of these witnesses and issues to Mr. Ray's defense, we would like to conduct the interviews in the same manner as previously. A telephone or video-conference will not provide Mr. Ray with an equally meaningful opportunity to interview these witnesses, and will impede his ability to make reference to the multiple documents ordered disclosed by the Court.

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MUNGER, TOLLES & OLSON LLP

Sheila Polk

October 4, 2010

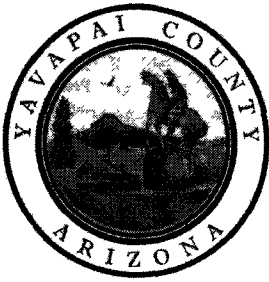
Page 2

Finally, Mr. Ray will be requesting a hearing to determine the amount of monetary sanctions to be imposed against the State for discovery violations.

Sincerely,

A handwritten signature in black ink, appearing to read 'Truc T. Do', with a stylized, cursive script.

Truc T. Do



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SHEILA POLK
Yavapai County Attorney

October 4, 2010

VIA Email and US Mail

Truc T. Do
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355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049: Your letter dated October 4, 2010 / Continuing Request to Limit Costs

Dear Ms. Do:

Notes of the December 14 Meeting

We agree to provide to you any notes covered by the Court's September 20 Order that are in our possession by this Friday, October 8. To the extent there are additional notes by participants not yet provided to this office, we will disclose them upon receipt.

Costs Associated with the Interviews of the Medical Examiners and the Detectives

Please reconsider your outright rejection of the State's proposal to conduct the re-interviews via video-conferencing. Thanks to today's technology, even meetings that involve documents are easily facilitated.

Please do not hesitate to contact me if you have any questions or need anything further.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Sheila S Polk".

Sheila Sullivan Polk
Yavapai County Attorney

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JONATHAN M WEISS
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MARGARET G ZIEGLER
ESTHER H SUNG

RICHARD D ESBENSHADE
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VIA EMAIL

Sheila Polk
Yavapai County Attorney's Office
255 East Gurley Street
Prescott, Arizona 86301

Re: State v. James Arthur Ray

Dear Sheila:

Thank you for agreeing to provide us with the notes ordered by the Court by this Friday, October 8. We also appreciate your offer to arrange a telephone or videoconference to conduct the re-interviews of the medical examiners and detectives, but respectfully decline for the reasons stated in my previous letter.

Sincerely,


Truc T. Do

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